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BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

THE CLERK: Hi, everybody. This is Laura, Judge Eifert's assistant.

MR. AYLSTOCK: Hi, Laura. This is Bryan.

THE CLERK: You all know the drill, if you don't mind to identify plaintiffs' counsel and then defense counsel.

MR. AYLSTOCK: This is Bryan Aylstock on behalf of the plaintiffs.

THE CLERK: Uh-huh.

MS. BAGGETT: Renee Baggett on behalf of the plaintiffs.

MR. CARTMELL: Tom Cartmell on behalf of the plaintiffs.

MR. ANDERSON: Ben Anderson on behalf of the plaintiffs.

MR. WALKER: Eric Walker for the plaintiffs.

MR. GARRARD: Henry Garrard for the plaintiffs.

THE CLERK: I'm sorry, I didn't get that last name.

MR. GARRARD: G-a-r-r-a-r-d.

THE CLERK: Thank you.

MR. GAGE: William Gage and Ben Watson for the defendant.

MR. RUBIN: Gary Rubin for the defendant.

1 THE CLERK: All right. Do we have everyone?

2 MR. AYLSTOCK: I think that's it, Laura.

3 THE CLERK: All right. Thank you very much. Hold  
4 one moment for Judge Eifert, please.

5 (Pause)

6 MAGISTRATE JUDGE EIFERT: Hello. Well, here we  
7 are. We meet again. It's becoming a regular thing, isn't  
8 it. I'm sorry. I guess I just need to talk to you all a  
9 lot to help me make up my mind.

10 Okay. We are here on the issue of the metadata that  
11 Drs. Klosterhalfen and Klinge have. And I want to first  
12 thank you all for sending me the information. I found it  
13 very useful. And it was nice to have all those cases  
14 collected for me and saved me a lot of time.

15 But I'll tell you the, the one article I found the most  
16 helpful was the article "Rationalizing Discovery as  
17 Metadata" which was in the *United States Law Week Bloomberg*  
18 *publication*. And I don't know if -- who that came from, if  
19 that was from the plaintiffs or the defendant. But whoever  
20 it came from ought to provide it to the other side if they  
21 haven't already done it because I think it's, it's very  
22 useful, especially in just putting some common sense context  
23 to the metadata. Honestly, I was somewhat at times confused  
24 about what we were talking about, and this was very, very  
25 helpful.

1           So, a lot of what I'm going to say, I think, comes from  
2           that. And a lot of the questions I have come from that  
3           article.

4           The first thing, I had looked at the actual subpoena.  
5           And it might be helpful if we go through Schedule A.

6           And you can tell me, Mr. Gage, whoever, Mr. Rubin,  
7           whoever wants to speak on, on behalf of the defendant what  
8           type of documents you think you're going to be getting in  
9           response to the particular categories.

10          The first one talks about documents and data in  
11          deponent's possession that would be subject to Ethicon's  
12          Confidentiality and Non-Disclosure Agreement.

13          What, what sort of documents do you anticipate  
14          receiving for this category?

15                 MR. GAGE: Judge, this is William Gage. I think,  
16          as Your Honor may have known, it was our intent to draw the  
17          document request rather narrowly of these two individuals so  
18          that we wouldn't be asking for stuff that really would be  
19          not relevant to the work that they did for Ethicon in their  
20          roles as consultants.

21          So, the purpose of that request was to, in a sentence,  
22          identify and notify the recipients that we wanted documents  
23          that would have been generated, you know, either received or  
24          sent by the two witnesses that pertained to the work that  
25          they did in their role as consultant for Ethicon.

1           So, that would include, for example, e-mails to and  
2           from Ethicon employees that would pertain to the consulting,  
3           you know, the work for which they were asked to consult. It  
4           may include test results or test data or analyses that were  
5           exchanged between Ethicon and the experts.

6           I mean, those are kind of the most, the two most likely  
7           documents that would have gone back and forth between the  
8           witnesses, or between the, the two experts and Ethicon  
9           employees.

10           MAGISTRATE JUDGE EIFERT: Are you aware of whether  
11           there were any databases or spreadsheets, PowerPoint  
12           presentations, anything like that, or would these primarily  
13           just be reports and e-mails?

14           MR. GAGE: Judge, when I would say things like  
15           analyses and reports, that -- I would use that term broadly  
16           such that if it were not a physical document like a Word  
17           document but, instead, a PowerPoint, I would, I would intend  
18           for that to be inclusive of things like PowerPoints or  
19           spreadsheets. Any, any form of data that went back and  
20           forth between the two witnesses and people at Ethicon that  
21           touched on the subject of the consulting relationship would  
22           be included in that Request Number 1.

23           MAGISTRATE JUDGE EIFERT: All right. And then, of  
24           course, Number 2, you're just talking about actual  
25           pathology. And that's the same for Number 3. You're

1 talking about pathology such as slides and blocks, physical  
2 pathology.

3 MR. GAGE: I think that's correct, Your Honor.

4 MAGISTRATE JUDGE EIFERT: Then Number 4 --  
5 Category 4 is -- I mean, wouldn't that already be sort of  
6 encompassed, at least the Ethicon portion of it, in Number  
7 1?

8 MR. GAGE: The Ethicon portion would -- Judge,  
9 could you read Number 4 to me? I'm trying to find those.

10 MAGISTRATE JUDGE EIFERT: Yeah. It says "All  
11 documents and data concerning either the Ethicon or  
12 non-Ethicon pathology in deponent's possession, custody, or  
13 control," which, quite honestly, --

14 MR. GAGE: Right.

15 MAGISTRATE JUDGE EIFERT: I don't -- that is so  
16 broad, and I don't know what your entitlement would be to  
17 receive pathology that has nothing to do with Ethicon.

18 MR. GAGE: Your Honor, I --

19 MAGISTRATE JUDGE EIFERT: Yes.

20 MR. GAGE: Both with respect to 3 and 4, to the  
21 extent that those made requests related to non-Ethicon  
22 documents and non-Ethicon pathology, we had -- you know  
23 how -- Your Honor remembers that we prepared a proposed  
24 stipulation to send to the plaintiffs on how to handle this.  
25 And we weren't able to work that stipulation out.



1           In the stipulation we made it clear that the, the  
2           purpose of asking for the non-Ethicon documents and  
3           pathology is really to say, "We are hereby making a formal  
4           request for that material if you intend to rely upon it as  
5           the, to form the basis of any of your opinions and/or if you  
6           intend to testify about any of that material in front of a  
7           jury."

8           The, the point -- and we included a provision in the  
9           proposed stipulation. The point was to say, "Hey, if you're  
10          going to use it, we want it. If you're not going to use it,  
11          we will, we will be moving the Court to exclude it because  
12          if you're not going to give it to us, you shouldn't be able  
13          to rely on it."

14          So, that's really kind of the reason that we made the  
15          request. Frankly, you know, we hope they don't rely on it  
16          and we hope they don't produce it because we don't want to  
17          get into that stuff. But if they do, then we had to at  
18          least have a formal request out there for it.

19                 MAGISTRATE JUDGE EIFERT: So, what you're actually  
20          asking for when you're asking for non-Ethicon materials  
21          would be materials that would form the basis of the opinions  
22          or statements or testimony of these experts.

23                 MR. GAGE: That's correct, Your Honor.

24                 MAGISTRATE JUDGE EIFERT: All right. And if,  
25          if -- because, honestly, I could just see that as being a

1 huge disaster for you to receive blocks of tissue that have  
2 absolutely nothing to do with Ethicon or mesh. But, but if  
3 you, if you think you've got that worked out, I'm not going  
4 to worry too much. That's sort of a side issue anyway. So,  
5 the --

6 MR. GAGE: Well, we actually haven't worked it out  
7 because we couldn't -- we were not able to reach agreement  
8 on the, on the terms of that stipulation. So, I mean, --

9 MAGISTRATE JUDGE EIFERT: So, --

10 MR. GAGE: We haven't really formally worked them  
11 out.

12 MAGISTRATE JUDGE EIFERT: Shouldn't your -- should  
13 your subpoena not ask for any documents or materials,  
14 pathology slides or whatever that form the basis of any of  
15 your opinions or testimony, or anticipated testimony rather  
16 than just asking for all pathology blocks?

17 MR. GAGE: Your Honor, this -- you may remember --  
18 I think these depo notices and document requests were issued  
19 before the plaintiffs had formally designated either of  
20 these two individuals as experts. Now, -- and these were  
21 the depo notices really for their fact depositions.

22 MAGISTRATE JUDGE EIFERT: Okay.

23 MR. GAGE: And, so, we will be -- I'm sure we'll  
24 be issuing -- in connection with Drs. Klinge and  
25 Klosterhalfen, since they've now been designated as experts,

1 I'm sure we'll be issuing standard document requests to all  
2 the plaintiffs' experts including Drs. Klinge and  
3 Klosterhalfen that would have those standard requests that  
4 say, you know, any and all documents and things you rely  
5 upon that form the basis for your expert opinions.

6 MAGISTRATE JUDGE EIFERT: Okay.

7 MR. GAGE: If those haven't already gone out, I'm  
8 sure they will be going out.

9 MAGISTRATE JUDGE EIFERT: Okay. Then the last  
10 category you have are documents including e-mails that  
11 pertain to deponent's work as a former Ethicon consultant  
12 and would reflect any communication with any individual who  
13 at the time of the communication was an Ethicon employee.

14 So, that's again encompassed, I would guess, in Number  
15 1.

16 MR. GAGE: It was a -- yes, Your Honor. It's kind  
17 of a bootstrap just to make sure -- in case anybody had any  
18 question, we, we specifically want to make sure we covered  
19 it.

20 MAGISTRATE JUDGE EIFERT: Now, what this article  
21 convinced me of is that much of the metadata that's out  
22 there is really not helpful and is not relevant to any issue  
23 that would come up. And it talks a lot about how a document  
24 under Rule 34 when it's electronic should be considered and  
25 what should be considered part of that document when you're

1 talking about metadata. And it made a lot of sense to me.

2 One of the things they suggested in this article is  
3 that the document would be essentially what the person sees  
4 on the screen, as well as any sort of metadata that would be  
5 needed to use the document.

6 For example, if you had a spreadsheet, you would need  
7 whatever the metadata is that would allow you to run that,  
8 run the data that's on that spreadsheet, but not necessarily  
9 all of the categories of metadata such as, you know, the  
10 formatting and the organization and the location of where  
11 it's stored and who created it and who accessed it and that  
12 type of thing.

13 So, I'm kind of inclined to not allow you to have just  
14 all of the metadata. I think what I'm, what I'm thinking is  
15 probably going to be necessary would be if there are  
16 databases or spreadsheets, and I don't know that there are,  
17 then you would likely be entitled to whatever metadata you  
18 would need to be able to use that document, but really not  
19 the other, other aspects, other types of metadata.

20 The other --

21 MR. GAGE: Your Honor, this --

22 MAGISTRATE JUDGE EIFERT: Yes.

23 MR. GAGE: Oh, I'm sorry. Go ahead. I'm sorry.

24 I didn't mean to interrupt you. I thought you were  
25 finished. It may be better for you to finish and then I'll

1 ask a question.

2 MAGISTRATE JUDGE EIFERT: All right. So, that  
3 kind of deals with the sort of thing like PowerPoint  
4 programs and -- or PowerPoint presentations and databases  
5 and spreadsheets.

6 Then when you talk about e-mails, there is, there's a  
7 lot of -- apparently it's not really all that difficult to  
8 just copy a native file e-mail and have all of the metadata  
9 related to that. I'm not sure that you really need all of  
10 it, but if it's easy to do and there's no problem with doing  
11 that, then that might be a way to go with e-mails.

12 The, the final thing would just be like Word documents.  
13 And, and there I'm not certain why you would need all that  
14 metadata unless you have some specific reason why you would  
15 need to know who created it, who accessed it, what changes  
16 were made, and so forth.

17 So, that's sort of the way I'm leaning. Now, tell me  
18 what you all think about that.

19 MR. GAGE: Judge, this is William Gage. I guess  
20 here's my thought. You know, the thing about metadata is,  
21 you know, the way that it, certainly with discovery between  
22 parties, everybody has to pretty much produce an amount.  
23 I'm pretty sure we're -- Ethicon is having to produce  
24 metadata, at least certain types of metadata under the  
25 various orders that have been entered. And, of course, a

1 lot of times you don't need the metadata. It's stuff that  
2 doesn't matter. But in some cases, it can be pretty  
3 important.

4 I think what I would ask Your Honor the leave to do is  
5 once we get the, the information from the two witnesses, we  
6 would like the ability -- I don't want to foreclose the, the  
7 door to open if, if we could come back to Your Honor -- if,  
8 if we look at the stuff and it looks like maybe there is a  
9 document we really do need the metadata for, we could make a  
10 particularized showing for that particular document or group  
11 of documents. And, and I think that may be a good way to  
12 let us -- you know, because it's hard talking about it in  
13 the dark.

14 But once we physically get the documents, we can look  
15 at -- if something really peaks our interest where we have a  
16 reason we need the metadata, then we can come back to Your  
17 Honor and say, "Judge, this is one where we really need it."

18 MAGISTRATE JUDGE EIFERT: I think that makes a lot  
19 of sense. And I'm glad that's where you want to go with  
20 this. I, I don't know --

21 Mr. Gage, have you and Mr. Rubin looked at this article  
22 on "Rationalizing Discovery of Metadata"?

23 MR. GAGE: I have not, Judge.

24 Gary, have you looked at it?

25 MR. RUBIN: No. I don't know what -- I apologize,

1 Your Honor. I don't know what you're referring to.

2 MR. WALKER: This is Eric Walker.

3 MAGISTRATE JUDGE EIFERT: Yeah.

4 MR. WALKER: I'm sorry. I just sent it to them,  
5 Your Honor.

6 MAGISTRATE JUDGE EIFERT: Okay. I really, I  
7 really found this article to be very commonsensical and  
8 useful. And I think as I was reading the cases, seeing the  
9 different approaches that the courts took, I really didn't  
10 have any understanding as to why some were going some way  
11 and some were going other ways.

12 And I think this article really helps, or helped me,  
13 anyway, to see that maybe the, the standards that some of  
14 the courts are using to make their determination is  
15 really -- doesn't make the most sense.

16 So, what I'd like you to do, Mr. Gage, Mr. Rubin,  
17 defendant, is when you -- when and if you come back and  
18 request metadata, to read this article and then maybe we can  
19 be sort of talking off the same page because I think it is  
20 very helpful.

21 And it doesn't take a position one way or the other.  
22 It's not, it's not biased to one side or the other. It just  
23 really talks about different types of metadata and how you  
24 use it and what you need and what you might find out there.

25 So, it sounds to me, though, like you -- I mean, I'm

1 certain the plaintiffs don't have any objection to producing  
2 the documents in hard copies as they've already done and  
3 just letting Ethicon decide if it needs metadata in the  
4 future.

5 MR. AYLSTOCK: No, Your Honor. I think that's --  
6 in fact, I think I suggested that at the last conference.  
7 But --

8 MAGISTRATE JUDGE EIFERT: Well, and I think that  
9 was, I think that was suggested, but I didn't, I did not  
10 understand that there had been any agreement to that. I  
11 thought we still had this issue looming out there. So, --

12 MR. GAGE: No, we, we -- that's correct, Your  
13 Honor. We still had the issue looming. But, I mean, you  
14 know, I mean, in light of Your Honor's -- I mean, you know,  
15 Your Honor's leaning, we, we appreciate it and we thank you  
16 for looking at it. And, and, you know, typically we would  
17 (recording inaudible) like Ethicon's producing to the  
18 plaintiffs, but we understand Your Honor's position and, you  
19 know, as long as we can come back.

20 If we see some stuff -- as Your Honor knows, one of the  
21 big issues is going to be what were these consultants  
22 telling Ethicon and at what time because that's obviously  
23 kind of the big factual issue. And if, if there's material  
24 that, that they produce to us in hard copy that, you know,  
25 goes to that particular issue, there may be other relevant



1 issues. But if there's something like that and we feel the  
2 metadata is something we need to look at, we can just come  
3 back.

4 MAGISTRATE JUDGE EIFERT: Well, I, I think that's  
5 a good idea. And I do -- I think one of the points that  
6 they try to make in this article is that there are certainly  
7 going to be times when you need the metadata. But it's  
8 usually going to be on a case by case basis for most of the  
9 metadata, although some things you have to have just to be  
10 able to use the document.

11 So, I think that's a distinction that they make, and  
12 that makes a lot of sense to me. And I think -- you know, I  
13 believe what you're all doing, and I haven't looked at your  
14 electronic discovery protocol for a while, your ESI  
15 protocol, but you're not producing all the metadata, are  
16 you? I thought you had just certain categories of metadata  
17 you had to produce.

18 MR. AYLSTOCK: That's correct, Your Honor.

19 MAGISTRATE JUDGE EIFERT: Yeah, okay.

20 MR. GAGE: Your Honor, one thing -- I'm sorry. Go  
21 ahead.

22 MAGISTRATE JUDGE EIFERT: No. Go ahead.

23 MR. GAGE: This is William Gage, Judge.

24 One thing that I think probably makes sense for us to  
25 do under these circumstances is I think it would be

1 important for the plaintiffs to notify Drs. Klinge and  
2 Klosterhalfen of the Court's ruling, and then also for them  
3 to take the steps that would be necessary to preserve, you  
4 know, not only the documents in their native format, but the  
5 metadata so that in the event we made a request, you know,  
6 for the metadata that, that we would not run into an issue  
7 where the metadata has been spoliated.

8 MR. GARRARD: Judge, this is Henry Garrard. I am  
9 involved with Dr. Klosterhalfen.

10 MAGISTRATE JUDGE EIFERT: Yes.

11 MR. GARRARD: I have already instructed  
12 Dr. Klosterhalfen that he is to preserve everything he has.  
13 We're not going to destroy anything.

14 There is one issue that I do need to raise. And that  
15 is in the request that they had made, we have interpreted it  
16 to call for any pathology reports that he rendered in regard  
17 to explants that Johnson & Johnson was involved in having  
18 him look at.

19 Under the German laws, he cannot produce the patient  
20 identifying information. And, so, I have told him to  
21 produce that with the names, for example, redacted from the  
22 reports because he cannot disclose that under German law.

23 And I would say to Mr. Gage that if there is some issue  
24 when we produce the stuff to him, if he'll let me know, we  
25 will try to rectify it with one caveat. And that is

1 Dr. Klosterhalfen is going on vacation for ten days  
2 starting, I believe, the 27th. So, it could be at the very  
3 tail end that I'm able to rectify that. But I wanted you to  
4 know that.

5 MAGISTRATE JUDGE EIFERT: Mr. Garrard, let me ask  
6 you, so, does that also mean that Dr. Klosterhalfen is not  
7 giving you any of the names?

8 MR. GARRARD: He, he is to produce to me the  
9 documents without the names.

10 MAGISTRATE JUDGE EIFERT: All right. Now, one  
11 thing that you might, you might want to do, and this is just  
12 a thought, is for some of these cases that are coming up,  
13 your trial cases, you might want to give him those names so  
14 that you could, through the plaintiff, connect the pathology  
15 report with the patient if it's, you know, because I, --

16 MR. GARRARD: Sure.

17 MAGISTRATE JUDGE EIFERT: -- because I think it  
18 might really be relevant to know the names for the  
19 particular patient whose case is being tried.

20 MR. GARRARD: If it is such as that, we'll do  
21 that.

22 MAGISTRATE JUDGE EIFERT: Okay.

23 MR. GARRARD: I'm not aware that that is the case,  
24 Your Honor.

25 MAGISTRATE JUDGE EIFERT: Okay.

1 MR. GARRARD: But if, if so, I certainly -- I  
2 understand that.

3 MAGISTRATE JUDGE EIFERT: All right. Okay. Well,  
4 I appreciate again you all getting together, especially on  
5 such short notice. And this has been helpful to me. I'm  
6 not going to issue any sort of order at this point because  
7 it sounds like we have an agreement that the documents will  
8 be produced at this point with no metadata, just in a hard,  
9 hard copy fashion. And that if the issue needs to be  
10 explored further, you'll come back.

11 MR. GARRARD: Yes, ma'am.

12 MAGISTRATE JUDGE EIFERT: All right.

13 MR. GAGE: Yes, Your Honor. And I think, I  
14 think -- and forgive me if we already have e-mails on this.  
15 But, Your Honor, I think the parties are -- I know we wrote  
16 you a letter and said we were going to try to get all this  
17 stuff done -- I think it was October 31.

18 MAGISTRATE JUDGE EIFERT: Yes.

19 MR. GAGE: And then I, I don't know if we ever  
20 closed the loop on when the plaintiffs were going to give us  
21 their documents. But I think they've proposed what,  
22 basically a simultaneous exchange, Bryan and Ben. And, Your  
23 Honor, that's fine with us if that's still --

24 How do you all want to handle it?

25 MR. AYLSTOCK: Yeah. This is Bryan. I think

1 that's fine, at least with regard to Dr. Klinge. I don't  
2 know about Dr. Klosterhalfen's vacation schedule.

3 Henry, does that --

4 MR. GARRARD: I'm going to do everything I can to  
5 get the documents that he's got prior to his vacation. He  
6 knows that. And I would anticipate we can meet the  
7 October 31 schedule. If there's a problem, I will let you  
8 know promptly, but I don't anticipate one.

9 MAGISTRATE JUDGE EIFERT: The depositions are  
10 still scheduled then in mid November?

11 MR. GARRARD: Scheduled for the 9th and 10th of  
12 November, Your Honor, for Dr. Klosterhalfen.

13 MAGISTRATE JUDGE EIFERT: All right. Great.  
14 Okay. Well, --

15 MR. AYLSTOCK: Judge, before I let you go, or you  
16 let me go, we were having a discussion on the plaintiffs'  
17 side, and I haven't had a chance to ask if this is okay with  
18 Mr. Gage and his team, but we were thinking that the  
19 discovery conference that I think is scheduled for this  
20 Friday can probably be pushed back at least a week at this  
21 point given kind of where we're at with things.

22 MR. GAGE: Your Honor, this is William Gage. I  
23 think that's fine. I know I polled my people and they had  
24 one issue they wanted to discuss. But, frankly, it's  
25 something I think doesn't -- it's not ripe yet. We just

1     need to talk to Ben Anderson about it.   So, we're fine with  
2     that.

3                 MAGISTRATE JUDGE EIFERT:   Okay.   Well, what I'll  
4     do is not reschedule it at all.   And then if you need to  
5     have something before the two weeks from Friday, just let me  
6     know.

7                 MR. AYLSTOCK:   Fair enough, Judge.

8                 MAGISTRATE JUDGE EIFERT:   Okay.   Thanks again.

9                 MR. GAGE:   Thank you very much, Judge.   We  
10     appreciate your doing this.

11                MR. AYLSTOCK:   Thank you, Judge.

12                MAGISTRATE JUDGE EIFERT:   You're welcome.

13     Bye-bye.

14                (Pceedings concluded)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6  
7  
8 s\Lisa A. Cook

October 28, 2013

9 Reporter

Date

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